

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>BARRY L. SMITH</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>PITTSBURG STATE UNIVERSITY</b>	)	
Respondent	)	Docket No. 258,509 &
	)	258,510
AND	)	
	)	
<b>STATE SELF-INSURANCE FUND</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appealed Administrative Law Judge Jon L. Frobish's Award dated January 23, 2003. The Board heard oral argument on July 8, 2003. Stacy Parkinson was appointed as Board Member Pro Tem for the purpose of determining this matter.<sup>1</sup>

**APPEARANCES**

Carlton W. Kennard of Pittsburg, Kansas, appeared for the claimant. William L. Phalen of Pittsburg, Kansas, appeared for the self-insured respondent.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

In Docket No. 258,510, the Administrative Law Judge (ALJ) determined claimant suffered a work-related injury to his right knee on April 30, 2000, which resulted in a 20 percent loss of use of the right lower extremity. The ALJ denied compensation in Docket

---

<sup>1</sup> Gary Peterson retired effective March 31, 2003, and at the time of oral argument a replacement had not been appointed to complete the unexpired portion of his term.

No. 258,509, finding claimant did not meet his burden of proof to establish the alleged left knee injury arose out of and in the course of employment.

The respondent requested review of the findings in Docket No. 258,510 and argues claimant did not suffer accidental injury to his right lower extremity arising out of and in the course of his employment. In the alternative, respondent argues it established claimant had a preexisting impairment to his right lower extremity and the ALJ erred when he failed to reduce the amount of functional impairment by such preexisting impairment. Finally, respondent requests that the ALJ's denial of compensation in Docket No. 258,509 be affirmed.

At oral argument before the Board, the claimant argued that in Docket No. 258,509, the injury to his left knee occurred while walking down stairs performing his job duties and was a specific compensable event rather than an activity of daily living as found by the ALJ. Claimant argues he is entitled to a 20 percent impairment for the left knee. Claimant requests the ALJ's Award in Docket No. 258,510 be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a police officer for respondent. His job duties required that he patrol the campus and perform building as well as security checks. In Docket No. 258,509 he alleged injury to his left knee in April 2000 while walking stairs in the course of his employment.

Claimant had a history of problems with both of his knees. On April 27, 1995, claimant had surgery on his right knee. On March 15, 1996, he had surgery on his left knee and a second surgical procedure on his left knee in approximately June 1998. Dr. Paul W. Toma noted claimant had an arthroscopic procedure performed on the left knee in May 1999. The claimant continued to receive treatment for his left knee several times a month every few months through September 1999. Claimant continued to experience swelling in the left knee and was taking medication to reduce the swelling.

On April 3, 2000, claimant alleged he injured his left knee while walking upstairs to perform a security check at Hartman Hall on the campus. Claimant described the incident as twisting his knee. Claimant later alleged his left knee gave out while going downstairs at McCray Hall. Claimant then explained that his left knee never really gave out but that it just started hurting. Claimant testified:

Q. What happened in April of 2000 to your left knee?

A. In April of 2000, I had -- Actually I just had a problem with my knee. It just started hurting. At that point, I told -- I told them that I had a problem, and I checked with the doctor and -- What we do in work there -- I'll just say this. In work at the University, it takes a lot of exercise to do it. I mean we check all our buildings and do a lot of things on stairways, and there's lots of stairs. And there actually was some places in different areas where there weren't even any elevators to use at that point. So that's about it. That's all I can say.<sup>2</sup>

Claimant must establish personal injury by accident arising out of and in the course of employment.<sup>3</sup> For a claim to arise "out of" employment, its cause or origin must develop out of the nature, conditions, obligations and incidents of employment.<sup>4</sup>

The ALJ's denial of benefits in Docket No. 258,509 is affirmed but for different reasons. Claimant had a long history of problems with his left knee and was receiving ongoing intermittent care for that condition. In June 2000 when claimant sought treatment for his right knee he did not make any complaints of left knee pain. Claimant gave inconsistent explanations regarding the specific alleged accident at work. Moreover, claimant did not provide a history of specific injury to the left knee to Drs. Terrence Pratt, Paul Toma or Edward Prostic. Consequently, the Board concludes claimant failed to meet his burden of proof to establish he suffered a work-related injury to his left knee.

In Docket No. 258,510 claimant alleged he suffered an injury to his right knee on April 30, 2000. Claimant noted he was performing a security check in a building on campus when he went around a corner walking fast and twisted his knee which popped and gave out. Claimant fell to the floor. Claimant then received a call to respond to a reported fight and as he attempted to get to his car he fell again.

The Workers Compensation Act (Act) states that the term "accident" should be construed in a manner to effectuate the Act's primary purpose that employers bear the expense of work related accidents. The Act provides:

'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and **often, but not necessarily, accompanied by a manifestation of force**. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate **the purpose of the workers compensation act that the employer**

---

<sup>2</sup> R.H. Trans. at 8.

<sup>3</sup> K.S.A. 44-501(a).

<sup>4</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995); *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984).

**bear the expense of accidental injury to a worker caused by the employment.**<sup>5</sup>  
(Emphasis added.)

Respondent argues that claimant injured his knee in an activity of daily living and, therefore, his knee injury cannot be considered as having been caused by work, citing K.S.A. 1999 Supp. 44-508(e), which provides:

'Personal injury' and 'injury' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. **An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.** (Emphasis added.)

Unfortunately, the Act does not define the phrase "normal activities of day-to-day living." Attempting to provide that phrase with a reasonable interpretation, the Board has previously held that K.S.A. 1999 Supp. 44-508(e) is a codification of the *Boeckmann*<sup>6</sup> decision where the Kansas Supreme Court denied benefits as Mr. Boeckmann's arthritic condition progressively worsened regardless of his activities. The Court said:

. . . there is no evidence here relating the origin of claimant's disability to trauma in the sense it was found to exist in *Winkelman*. No outside thrust of traumatic force assailed or beat upon the workman's physical structure as happened in *Winkelman*.<sup>7</sup>

The Board finds that claimant sustained trauma to his right knee when he turned abruptly while walking. That trauma was sufficient to require surgical repair of the right knee. Therefore, he sustained an identifiable accident and the *Boeckmann* case is distinguishable from this claim.

An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment.<sup>8</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>9</sup>

---

<sup>5</sup> K.S.A. 1999 Supp. 44-508(d).

<sup>6</sup> *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

<sup>7</sup> *Id.* at 736.

<sup>8</sup> *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 771, 955 P.2d 1315 (1997).

<sup>9</sup> *Springston v. IML Freight, Inc.*, 10 Kan. App. 2d 501, 704 P.2d 394, *rev. denied* 238 Kan. 878 (1985).

Claimant walks every day at work and when away from work. The injury, however, did not result from walking but from the lateral pressure exerted on the knee from turning abruptly or changing direction. This was an activity that arose out of the nature, condition, obligations, or incidents of the employment. The Board finds, therefore, that claimant's accidental injury is compensable because it did arise out of the employment.

Dr. Paul W. Toma examined claimant on April 26, 2001, and opined he had a 20 percent permanent partial functional impairment to the right knee. The doctor further noted that 15 percent preexisted the injury to claimant's right knee in 2000.

At the request of his attorney, claimant was examined on October 8, 2001, by Dr. Edward J. Prostic who opined claimant had a 10 percent permanent partial functional impairment to the right knee. But Dr. Prostic admitted that if he were retained by the respondent he would have found 5 percent preexisting on the right knee.

The ALJ ordered an independent medical examination of claimant to be performed by Dr. Terrence Pratt. The doctor performed his examination of the claimant on March 11, 2002, and concluded that claimant had a 20 percent permanent partial impairment to his right knee but that 7 percent was attributable to the work-related accident in April 2000. The doctor testified:

Q. Just so the record is clear, on the right knee, as I read your report, you're assigning 20 percent impairment to the right lower extremity; is that correct?

A. That's correct.

Q. And that's based on the AMA Guidelines, Fourth Edition; true?

A. Correct.

Q. And you're assigning 7 percent of that to the April, 2000 injury at Pittsburg State University; is that correct?

A. That's correct.<sup>10</sup>

The Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injury is an aggravation of a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased

---

<sup>10</sup> Pratt Depo. at 24.

disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.<sup>11</sup>

The Board interprets the above statute to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment was actually rated or that the individual was given formal medical restrictions. A physician may appropriately assign a functional impairment rating for a preexisting condition that had not been rated. However, the physician must use the claimant's contemporaneous medical records regarding the prior condition. The medical condition diagnosed in those records and the evidence of the claimant's subsequent activities and treatment must then be the basis of the impairment rating using the appropriate edition of the *AMA Guides*<sup>12</sup>. And respondent and its insurance carrier bear the burden of proving the amount of claimant's preexisting functional impairment.<sup>13</sup>

K.S.A. 44-510e requires that functional impairment be determined based upon the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria.<sup>14</sup>

Dr. Pratt specifically utilized the *AMA Guides* and determined that claimant's preexisting functional impairment to the right knee was 13 percent and that 7 percent was attributable to his April 30, 2000, work-related injury. Respondent has met his burden of proof to establish claimant's preexisting functional impairment and consequently the ALJ's Award is modified to reflect claimant is entitled to compensation based upon the 7 percent additional impairment attributable to the April 30, 2000 work-related accident.

### **AWARD**

**WHEREFORE**, it is the finding of the Board that the Award of Administrative Law Judge Jon L. Frobish dated January 23, 2003, denying accidental injury arising out of and in the course of employment in Docket No. 258,509 is affirmed.

**WHEREFORE**, it is the finding of the Board that the Award of Administrative Law Judge Jon L. Frobish dated January 23, 2003, in Docket No. 258,510 is modified to award

---

<sup>11</sup> K.S.A. 1999 Supp. 44-501(c).

<sup>12</sup> American Medical Ass'n *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>13</sup> *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. \_\_\_\_ (2001).

<sup>14</sup> *Leroy v. Ash Grove Cement Company*, No. 88,748 (Kansas Court of Appeals unpublished opinion filed April 4, 2003) (copy attached pursuant to Sup. Ct. Rule 7.04).

compensation benefits based upon a 7 percent permanent partial loss of use of the right lower extremity.

The claimant is entitled to 14 weeks permanent partial compensation at the rate of \$372.32 per week or \$5,212.48 for a 7 percent loss of use of the right lower extremity which is due, owing and ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August 2003.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Carlton W. Kennard, Attorney for Claimant  
William L. Phalen, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director